Supreme Court, U.S.
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No. 93-1028

IN THE

Supreme Court of the United States

October Term, 1993

BANKRUPTCY PLAN COMMITTEE
OF THE BANK BUILDING & EQUIPMENT CORP.
OF AMERICA, IN LIQUIDATION

Petitioner,

vs.

RELIANCE INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

I. QUESTIONS OF FEDERAL, NOT STATE, LAW ARE CONTROLLING HERE.

Reliance Insurance Co. states in its opposition to the petition:

> This writ should also be denied since the Court of Appeals did not ultimately decide a controlling question of federal law. It merely affirmed the District Court's interpretation of the Reliance policy under Delaware law.

Opposition at 13 (emphasis omitted). This statement does not fairly or accurately reflect the basis of the decisions below. To the contrary, the district court stated, in its opinion adopted by the court of appeals, that federal bankruptcy law, and not state contract law, controlled its decision:

> The phrase "on behalf of the Company" takes on special meaning due to the bankruptcy.... [T]he phrase in question must be construed within the realm of bankruptcy law.... [T]he issue central to this case is what is meant, under bankruptcy law, by the phrase "on behalf of the Company".

Petition Appendix ("App.") at pages 14a-15a.[1]

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[1] As noted in the Petition, the courts below found that, in light of the multiple provisions of the policy addressing the issue of bankruptcy, the absence of an express exclusion for actions brought by a bankruptcy trustee or on behalf of a bankruptcy estate would lead to the conclusion, under Delaware law, that such actions were not excluded from coverage. It was only the lower courts' decision to seek a special meaning under bankruptcy law for the phrase "on behalf of the Company" that led to the conclusion that actions brought by the Bankruptcy Plan Committee, as trustee of the estate, were brought on behalf of the debtor company. *See* discussion in Petition at 5-6, and 14 n.6, *citing* App. 15a.

Furthermore, both the bankruptcy estate and the bankruptcy trustee are creations of federal law. This case presents questions regarding the precise nature of the bankruptcy estate, and the estate's and trustee's legal relationship to the debtor. These are indisputably questions of federal law, and are the very questions raised in the petition. *See* Brief of *Amicus Curiae*, National Association of Bankruptcy Trustees, In Support of Granting *Certiorari* ("Amicus Brief") at 2-3 ("the decision below is based upon an erroneous view of the nature of a bankruptcy estate and the role of the bankruptcy trustee").

II. RESPONDENT'S OPPOSITION ASSUMES, RATHER THAN ESTABLISHES, ITS FUNDAMENTAL PREMISES.

The important and difficult questions presented by the petition revolve around a determination of the nature of the bankruptcy estate, and the estate's and bankruptcy trustee's legal relationship to the debtor. Respondent, however, avoids these questions by assuming without explanation that the terms "debtor" and "bankruptcy estate" are interchangeable. Respondent's assumption is contrary to law,[2] and it is also unsupported by the record documents on which it relies.

For example, Article XII, Section 12.1 of the Plan of Liquidation (the "Plan") provides that the Bankruptcy Plan Committee will prosecute "any and all claims or causes of action held *by the estates* of the Consolidated Debtors ... *on behalf of the Estates* ...." App. 5a; Resp.App. B-1 (emphasis added). This provision does not state, as respondent suggests, that the Bankruptcy Plan Committee is to prosecute causes of action on behalf of the debtor company, BBC. Similarly, if the debtor and its estate are one and the same, as respondent suggests, why do the bankruptcy documents carefully distinguish between them? *See, e.g.*, Art. VII, Section (C)6

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[2] *See* Petition at 14-15; Amicus Brief at 2-3.

of the Disclosure Statement, which provides: "The Plan Committee ... shall have the right to bring all actions and proceedings belonging to the Consolidated Debtors *or* their Estates...." Opposition at 5; Resp.App. C-1 (emphasis added).[3]

Petitioner does not dispute that, in bringing suit against the directors and officers, the Bankruptcy Plan Committee was asserting claims "in the right of" BBC or "derived from" BBC. The source of the rights asserted, however, presents an issue distinct from the question presented in the Petition regarding *on whose behalf* those rights are asserted. The National Association of Bankruptcy Trustees, *amicus curiae* herein, states this succinctly: "The bankruptcy trustee, although acting pursuant to rights derived from the debtor, acts on behalf of the creditors." Amicus Brief at 3.

III. RESPONDENT MISAPPREHENDS THE SIGNIFICANCE OF THE BANKRUPTCY PLAN COMMITTEE'S SUIT BEING THE EQUIVALENT OF A SHAREHOLDERS DERIVATIVE SUIT.

Respondent argues that the procedural requirements for a shareholders derivative suit were not satisfied in this case. Opposition at 24-25. This argument is besides the point. Petitioner does not contend that its state court lawsuit is a shareholders derivative action. Rather, petitioner contends that the insurance policy at issue divides actions brought on behalf of the company into two categories—shareholders

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[3] Respondent also misquotes Section 1.31 of the Plan in support of its equation of the debtor and the debtor's bankruptcy estate. *Compare* Opposition at 3 with App. 5a ("Plan Committee shall mean the Committee of three individual *creditor* representatives...") (emphasis added). Even when accurately quoted, however, this provision adds nothing to respondent's argument: the question here is the Bankruptcy Plan Committee's legal status and the capacity in which it acts, not how the members of the committee were selected.

derivative actions, which are covered; and certain other actions, which are not—and that, given the provisions of bankruptcy law vesting the right to bring stockholder derivative actions in the bankruptcy trustee, this case does not fall neatly into either of the two categories. Because the state court suit filed by the Bankruptcy Plan Committee is closely akin to a shareholders derivative action and does not reflect the type of collusion which the "insured v. insured" exclusion is intended to guard against, the policy should be interpreted to provide the directors and officers with coverage for the Bankruptcy Plan Committee suit.[4]

CONCLUSION

Petitioner requests the petition for *certiorari* be granted.

Respectfully submitted,

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[4] Respondent's glib suggestion that, "if the exclusion is as onerous as suggested by the petitioner, perhaps insureds should negotiate with their insurers to eliminate it from their D&O policies," Opposition at 26, cannot be taken seriously. The standardized terms offered by insurance companies in their policies are typically "non-negotiable." Furthermore, respondent's argument cuts both ways: if an insurer wishes to exclude from D&O coverage actions brought by a bankruptcy trustee or on behalf of a bankruptcy estate, the insurer can (more easily than the insureds) rewrite its policies to expressly state such an exclusion.